

## COMMENTS

### MENTAL PRIVACY: AN INTERNATIONAL SAFEGUARD TO GOVERNMENTAL INTRUSIONS INTO THE MENTAL PROCESSES

The mind is the heart of liberty, its last stronghold. It is because that stronghold is hidden and beyond the reach of any dictation that liberty grows irresistibly in strength.<sup>1</sup>

In spite of the various United Nations provisions concerning the personal integrity of individuals, no state is expressly precluded from altering the mental processes of its nationals.<sup>2</sup> This comment will reveal examples of human modification techniques that are being utilized by governments as instruments to repress dissidence. In this regard, attention will be focused on political dissidents in the Soviet Union and incarcerated deviants in the United States.

Certain United Nations documents demonstrate that this organization does not condone such state practices.<sup>3</sup> Because of the potential abuse of such state intrusions, adoption of an international right to privacy will be urged. Such a right would impose an express prohibition upon states, requiring them to abstain from intervention into the thought processes of their nationals for

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1. J. CARY, *POWER IN MEN* 18 (1963) [hereinafter cited as *POWER IN MEN*].

2. McDougal, Lasswell, & Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 *YALE L. J.* 901 (1974).

Individuals are said to be the "nationals" of a state when that state asserts, and the larger world community honors, claims to protect and control such individuals for all the comprehensive purposes of states, as contrasted with occasional particular exercises of competence under varying principles of jurisdiction.

*Id.*

3. Although the United Nations has enacted provisions which relate to human rights, a state's legal obligation with respect to domestic behavior affecting the rights of its nationals is not clear. This situation seems to exist because the specific content of the state's obligation, the prescribed and prohibited state behavior, and the individual human rights protected need further elaboration through interpretation. See Schluter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 *CALIF. L. REV.* 110, 127 (1973) [hereinafter cited as Schluter].

social or political purposes. Having proposed this right, a vehicle will be recommended by which the United Nations can safeguard it.

### I. INTRUSIONS INTO THE MENTAL PROCESSES FOR POLITICAL REASONS

The constitution of the Soviet Union guarantees to Soviet citizens not only freedom of speech, but the material requisites necessary for the exercise of that right.<sup>4</sup> Another provision of the Soviet constitution guarantees "inviolability of the person,"<sup>5</sup> which in theory protects the individual against indiscriminate incarceration.

Despite these constitutional guarantees, there are thousands of political psychiatric cases in the Soviet Union.<sup>6</sup> Virtually any Soviet citizen who undergoes a psychiatric examination may find himself pronounced neurotic or psychotic on the flimsiest of grounds.<sup>7</sup>

It must be borne in mind that alongside a forensic psychiatric system dominated by the KGB, there is a much larger system of ethically run and well organized clinics which are staffed by psychiatrists who abhor such psychiatric practices.<sup>8</sup> Yet the power of the KGB is so pervasive that the opportunity is great for creating new syndromes to incriminate political dissidents.<sup>9</sup> Some psy-

4. Article 125 of the Soviet Constitution provides:

In conformity with the interests of working people, and in order to strengthen the socialist system, the citizens of the U.S.S.R. are guaranteed by law:

(a) freedom of speech. . . . These civil rights are ensured by placing at the disposal of the working people and their organizations printing presses, stocks of paper, public buildings, the streets, communication facilities and other material requisites for the exercise of these rights.

CONSTITUTION OF THE UNION OF SOVIET SOCIALIST REPUBLICS art. 125 (1936).

5. *Id.* Article 127 of the Soviet Constitution provides: "Citizens of the U.S.S.R. are guaranteed inviolability of the person. No person shall be placed under arrest except by decision of a court of law or with the sanction of a procurator."

6. *THE ECONOMIST*, July 8, 1972, at 41 [hereinafter cited as *THE ECONOMIST*]. For a few examples of such cases, see *Hearing Before the Subcomm. to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Comm. on the Judiciary*, 92d Cong., 2d Sess., at 136 (1972) [hereinafter cited as *1972 Hearings*].

7. *THE ECONOMIST*, *supra* note 6, at 41.

8. *Id.* The initials KGB stand for *Komitet Gossudarrst-vennoi Bezopastnosti* (Committee of State Security; Soviet Secret Police). R. DESOLA, *ABBREVIATIONS DICTIONARY* 151 (3d ed. 1967).

9. Two main types of psychiatric repression are employed in the Soviet Union. One type, compulsory psychiatric treatment, is ordered by the courts for

chiatric reports in Russia have included as symptoms of mental illness:

[P]ersistent mania for truth-seeking, [wearing] a beard, meticulousness of thought and insufficient insight with regard to the existing situation . . . pathologic development of personality combined with a zeal for reform, inclination to fruitless philosophizing, pretentiousness and inclination toward scriptomania . . . .<sup>10</sup>

These psychiatric symptoms seem to be the products of the value judgments of unscrupulous Soviet psychiatrists.<sup>11</sup> The use

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persons having been accused of crimes and declared insane by forensic psychiatric commissions. The second type is an order by a psychiatrist who occupies an administrative position and has the effect of forcibly hospitalizing that person. 1972 *Hearings*, *supra* note 6, at 6. Once a person has been found in need of compulsory psychiatric treatment his imprisonment can only be terminated by a court of justice. 1972 *Hearings*, *supra* note 6, at 7. The court of justice may release a person if it finds that incarceration was wrongful or if a medical commission determines that the person has recovered his sanity.

In practice, a favorable determination by the commission usually depends on the readiness of the patient to give desired answers to certain questions, namely, recognition of the correctness of the patient's confinement, admission that his views were wrong, and the promise to conform with the established ideology in the future. It is evident that for persons free of any guilt, such admissions often are impossible on a moral basis. In such cases, compulsory treatment may continue indefinitely, even to the end of the patient's life. Soviet legislation provides no limit for compulsory treatment.

1972 *Hearings*, *supra* note 6, at 7.

10. *Id.* at 26.

11. It is the absence of accurate diagnostic criteria and the lack of sufficient information on the clinical limits of psychic disturbances that motivated a special committee of experts from the World Health Organization (WHO) to recommend the following definition of mental illness as:

A pronounced disturbance in psychic activity, sufficiently specific in character that it can always be recognized and identified with a typical set of symptoms and sufficiently serious to produce a loss in the ability to work, or to incapacitate the person in a way as to require prolonged absence from work or require specific legal or other social action.

1972 *Hearings*, *supra* note 6, at 25.

By utilizing one's political outlook as a symptom of mental illness, a critic of a social system can easily be made to appear mentally deranged. *See e.g.*, 1972 *Hearings*, *supra* note 6, at 136. In one case, a Soviet critic was pronounced to be suffering from schizophrenia after being tried without having appeared in court. The court determined that "the basis of his schizoid personality stemmed from his 'reform delirium.'" 1972 *Hearings*, *supra* note 6, at 135.

The occurrences of certain political events can bring about the release of certain political prisoners. For example, after the fall of Khrushchev, political prisoners who had been incarcerated for criticizing a political decision which Khrushchev's successors condemned, were deemed "healthy" and released. 1972 *Hearings*, *supra* note 6, at 137.

In the United States, the White House Plumbers in 1971 engaged in the at-

of such syndromes as indicators of mental illness provides the Soviet government with an excuse for ridding itself of individuals who espouse unacceptable ideas.<sup>12</sup> By labeling as pathological the value judgments or political opinions that an individual advocates, psychiatrists coerce those expressing political views different from or at odds with the Soviet government to adopt a "correct point of view."<sup>13</sup>

Such practices result in the governmental suppression of dissent in a manner that stifles contrary political views and maintains the status quo. Moreover, whether an individual released from a mental institution remains free in many instances depends upon his ability to refrain from disseminating anti-Soviet views.<sup>14</sup> The Russian practice of confining political prisoners in mental hospitals and treating them as mentally ill is increasing.<sup>15</sup> Once incarcerated, prisoners are often subjected to chemical treatment which causes atrophy of the brain.<sup>16</sup>

This arbitrary intrusion into the minds of Soviet citizens seems to be done for the sole purpose of advancing political and

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tempted repression of political views which they deemed to be against national interests when they requested CIA doctors to construct a psychiatric profile of Daniel Ellsberg. This profile was prepared without the psychiatrists ever having met Ellsberg. They simply pieced together news clippings and F.B.I. and other governmental reports on Ellsberg. Such profiles are often called "psychohistories." Supporters of psychohistories say that secondhand material can sometimes reveal more about a person than his own words when he knows he is under analysis. Because the first profile portrayed Ellsberg in a reasonably favorable manner, the White House Plumbers judged it unsatisfactory and asked for another report. Apparently, the intent of the government was to use these negative psychiatric reports to portray Ellsberg as being mentally unsound and to thus discredit him and his political message in the eyes of the public. See *TIME*, Aug. 12, 1974, at 41.

12. One patient in a Soviet psychiatric institution when being informed of the nature of his illness was told:

Your release depends entirely on your behavior. And, your behavior, to us, means your political views. In all other respects your behavior is perfectly normal. Your illness consists of your dissenting opinions. As soon as you renounce them and adopt a correct point of view, we will let you go.

1972 *Hearings*, *supra* note 6, at 136.

13. *Id.*

14. See generally 1972 *Hearings*, *supra* note 6; *THE ECONOMIST*, *supra* note 6, at 41.

15. Dr. Norman Hirt, an associate professor of psychiatry at the University of British Columbia in Vancouver has stated that "conditions [in the Soviet Union] have gotten worse since he testified in 1972 that 7,000 to 8,000 Soviet dissidents were being so confined." *Los Angeles Times*, March 2, 1975, at 5, col. 1.

16. *Id.*

ideological ends of those in power.<sup>17</sup> Evidently, political dissidents are not constitutionally protected from such feigned medical procedures. Instead, they are subjected to medical "treatment" which has as its end "social control."<sup>18</sup>

## II. DESTRUCTION OF PARTS OF THE MENTALITY FOR SOCIAL PURPOSES

Medical techniques in the United States which intrude into the mental processes of the individual are different from those being used in the U.S.S.R. Rather than purposely destroying the individual's intellect with chemical substances, the principle threat to a person's mental integrity in the United States is psychosurgery.<sup>19</sup>

Psychosurgery is a pacifying operation which blunts the emotions and subdues behavior regardless of the presence or absence of any brain disease or any particular psychiatric problem. It is simply a mutilating operation whose effect is to destroy the individual's ability to respond emotionally.<sup>20</sup>

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17. See generally *NEWSWEEK*, Jan. 7, 1974, at 36.

18. See generally 1972 *Hearings*, note 6, *supra*.

19. Psychosurgery did not cease with the advent of psychotherapeutic drugs. By conservative estimates, at least forty neurosurgeons and psychiatrists in the U.S. today perform more than 600 procedures per year. Moreover, the results of a survey indicate that psychosurgeons anticipate a second wave of psychosurgery, at least equal to the first surge, which involved a total of 50,000 patients in the U.S. alone. Breggin, *Lobotomies Are Still Bad Medicine*, *MEDICAL OPINION*, March, 1972, at 32 [hereinafter cited as *MEDICAL OPINION*].

It is interesting to note that in 1951, the Soviet Union made lobotomies illegal. *Id.*

20. *Hearings on S. 974, S. 878 and S.J. Res. 71 Before the Subcomm. on Health of the Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess., pt. 2, at 439 (1973) [hereinafter cited as 1973 *Hearings*]. See also *Symposium: Psychosurgery*, 54 *BOSTON U.L. REV.* 215 (1974). For a collection of representative definitions, see Annas & Glantz, *Psychosurgery: The Law's Response*, 54 *BOSTON U.L. REV.* 249 n.4 (1974).

The purpose of psychosurgery in the prison system is to modify conduct or eradicate deviance in the prisoner. It has been stated that the term psychosurgery is limited to operations on "healthy" brain tissue. Operations on epileptic or damaged brains are considered to be within the general classification of neurosurgery. Operations on "healthy" brain tissues may cover situations where the making of a lesion on the brain is to control the pain of a terminal cancer patient. See Neville, *Pots and Black Kettles: A Philosopher's Perspective on Psychosurgery*, 54 *BOSTON U.L. REV.* 340, 346 (1974) [hereinafter cited as Neville].

The term psychosurgery refers to a variety of operative procedures which attempt to modify patient behavior by surgical techniques. . . . Psychosurgery has been used to modify such diverse behavior as homosexuality, frigidity, hyperactivity, schizophrenia, acute depression, criminal activity, compulsive gambling, alcoholism, and drug addiction.

Psychosurgery makes changes in the brain which are qualitative as well as quantitative.<sup>21</sup> The quantitative change is brought about by removal of part of the brain. The qualitative changes are made evident by psychological studies of patients who have undergone psychosurgery. These studies demonstrate that psychosurgery does not markedly affect the individual's intelligence quotient. Instead, it produces a shift from abstract to concrete attitude and adversely affects the subject's planning capacity and his ability to maintain prolonged attention.<sup>22</sup> The reason that psychosurgery does not change an individual's intelligence quotient is that psychosurgeons can control the general outcome of the operation by varying the location of the incision. The lower the cut on the brain, the more the impairment on its emotional parts, and the higher the cut, the more the intellectual impairment.<sup>23</sup> Even if the loss is only partial, there is still a change in the "essence of the person"<sup>24</sup> because the thought process of the individual is altered.<sup>25</sup>

The most controversial use of psychosurgery is the destruction of brain cells that are believed to be sources of aggression in

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Comment, *Constitutional Law—An Involuntarily Detained Mental Patient's Informed Consent is Invalid for Experimental Psychosurgery*, 50 CHI. KENT L. REV. 526, 527 (1974) [hereinafter cited as *Patient's Informed Consent*].

21. See Robinson, Freeman & Watts, *Personality Changes After Psychosurgery*, PROCEEDINGS OF THE FIRST RESEARCH CONFERENCE ON PSYCHOSURGERY 159 (Public Health Service Pub. No. 16) [hereinafter cited as *Public Health Service*].

22. *Id.*

23. MEDICAL OPINION, note 19, *supra*.

24. If life is to have any moral meaning, man must be treated as if he has free will. The problems of life can then often be examined and understood as reflecting the anxiety generated by free will, the agony of choice, the despair of failure to choose and to act. What is man without this capacity?

The possession of this capacity is the essence of man which psychosurgery changes. Breggin, *The Second Wave*, MENTAL HYGIENE, March, 1973, at 13 [hereinafter cited as *MENTAL HYGIENE*].

25. The individual seems to lose contact with his "self". There are test results which lend support to the notion that:

[P]sychosurgery prevents the development of strong tensions regarding self (a development which makes for maladjustment sometimes but also for depth and growth of personality) through reducing the individual's awareness of self-continuity, which thus appears to be mediated by the frontal lobes and their connections.

Thus the individual seems to lose consciousness of the self. However, "an over-developed awareness of self-continuity may underlie mental illness; some degree of it is essential for successful psychotherapy." See *Public Health Service, supra* note 21, at 159-60.

certain "uncontrollable persons."<sup>26</sup> The concept "uncontrollable" or "dangerous" is equivocal and demonstrates the tremendous power resting with prison officials, neurosurgeons, or behavioral therapists,<sup>27</sup> who alone may decide whether psychosurgery is to be performed on inmates.<sup>28</sup>

Since it has been noted that psychiatrists make mistakes when predicting which persons will continue to demonstrate anti-social conduct,<sup>29</sup> psychiatric recommendations for psychosurgical treatment are questionable.<sup>30</sup> One study surveying all published literature on the prediction of anti-social conduct revealed that psychiatrists were particularly prone to commit the error of over-

26. Recent approaches to psychosurgery have focused on the limbic system, which is part of the cerebrum adjacent to and connecting with the brain stem. Some leading proponents of psychosurgery for behavioral control contend that violent behavior is initiated in the brain stem but that the limbic system contains the mechanisms for controlling violence. Nevertheless, knowledge about the functions of the limbic is considered inadequate, and even advocates of psychosurgery admit that there is a disturbing inconsistency in the findings. . . .

Spoonhour, *Psychosurgery and Informed Consent*, 26 U. FLA. L. REV. 432, 434 (1974) [hereinafter cited as Spoonhour].

27. Gobert, *Psychosurgery, Conditioning, and the Prisoner's Right to Refuse "Rehabilitation"*, 61 VA. L. REV. 155, 174 (1975) [hereinafter cited as Gobert].

The lack of standards governing psychosurgical operations has stirred Congress to propose legislation that would affect the government's involvement with psychosurgical procedures. The following three measures relate directly to the subject psychosurgery: Senate Bill 878 would preclude the appropriation of federal funds for human research programs unless, among other things, the informed consent of the subject is obtained by adequate methods. Senate Joint Resolution 86 called for a two year moratorium on the expenditure of federal funds on projects that relate to psychosurgery. H.R. 6852 would preclude federal funds from being given to certain federally connected institutions which failed to make the performance of psychosurgery an unlawful practice. Thus far, this bill has not come up for a vote on the floor of the House of Representatives. There were hearings held on S.J. Res. 86 and S. 878 on June 29, 1973. However, the hearings did not result in Congress enacting the legislation. See generally 1973 *Hearings*, note 20, *supra*. See also *Congress Weighs 2 Measures*, 225 J. AM. M. ASS'N 1044 (1973) [hereinafter cited as *Congress Weighs 2 Measures*].

28. Gobert, note 27, *supra*; cf. Hirschkipt & Milleman, *The Unconstitutionality of Prison Life*, PRISONS, PROTEST AND POLITICS 87 (1972).

29. Despite the possible existence of certain premonitory signs and symptoms that can be used to predict violence, a major obstacle to the use of such signs is the prevalence of similar signs and symptoms in people who never commit a violent act. See Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 441 (1974) [hereinafter cited as Diamond].

30. For an article discussing a psychiatrist's difficulties in predicting an inmate's dangerousness to others, see Diamond, note 29, *supra*. See also Ericson, *Psychiatrists in Prison: On Admitting Professional Tinkers into a Tinkers' Paradise*, 22 CHITTY'S L. J. 29 (1974).

prediction.<sup>31</sup> Only a few of the inmates whom psychiatrists predict to be violent actually engage in such conduct if released.<sup>32</sup>

It must be borne in mind that these so-called "uncontrollable persons" are, at the outset, incarcerated because they have deviated from a social norm. Since social norms and crimes are phenomena of social and political definitions, they cannot be dealt with exclusive of moral judgments.<sup>33</sup> Merely labeling an individual as a social deviant does not seem to warrant or justify psychosurgery.<sup>34</sup>

[P]sychosurgical operations are best compared to the . . . ancient practices of cutting off a limb or poking out the eyes of accused criminals. That doctors do the mutilating should not distract us from the function it serves—impairment of the individual to control his behavior.<sup>35</sup>

As a general rule in the United States, a person is not subjected to psychosurgery without giving his consent.<sup>36</sup> The key-

31. Dershowitz, *Psychiatry in the Legal Process*, "A Knife that Cuts Both Ways", 51 JUDICATURE 370, 376 (1968) [hereinafter cited as Dershowitz].

32. *Id.* at 377.

33. It seems to be an individual's deviance from a social value or a codified social norm which causes the person to be a potential subject for psychosurgery. Deviance is primarily an issue of sociology and politics because it is created by social groups. "[D]eviance is not a quality of the act the person commits but rather a consequence of the application by others of rules and sanctions to an 'offender.'" H. BECKER, *OUTSIDERS* 9 (1963).

In addition to recognizing that deviance is created by the responses of people to particular kinds of behavior, by the labelling of that behavior as deviant, we must also keep in mind that the rules created and maintained by such labelling are not universally agreed to.

*Id.* at 18.

The social and political dangers of psychosurgery as a "cure" for social and political problems is made evident by the fact that some psychosurgeons have recently received grants of over \$600,000 from the Department of Health, Education and Welfare and the Law Enforcement Assistance Administration to do research into their theories that brain abnormalities, rather than slum conditions may be the reason for violence during ghetto riots. See Shawcross, *Creating a Clockwork Orange*, NEW STATESMAN, Mar. 30, 1973, at 452 [hereinafter cited as Shawcross].

34. See generally MEDICAL OPINION, note 19, *supra*. The classification or categorization of a person as a candidate seems to be made in absence of adequate guidelines. One psychiatrist has stated:

I think they ought to define the conditions for which they operate with greater specificity. What is aggressive behavior? Who the hell knows? In the loosest sense we are all behavior problems, and we all require protections from our aggression in one situation or another.

1973 Hearings, *supra* note 20, at 379. For congressional reaction to this problem see *Congress Weighs 2 Measures*, note 27, *supra*.

35. See MENTAL HYGIENE, *supra* note 24, at 13.

36. A physician has a duty to reveal to the patient adequate information so that the patient is able to make an intelligent choice. This duty to disclose



stone of any legal intrusion upon the body of a person is full, adequate and informed consent. To be legally adequate, a subject's informed consent must be competent, knowing and voluntary.<sup>37</sup>

Only one court has directly addressed the issue of consent as it relates to psychosurgical procedures. In *Kaimowitz v. Dept. Mental Health*,<sup>38</sup> a Michigan trial court held that involuntarily detained mental patients could not give informed and adequate consent to experimental psychosurgical procedures on the brain. The court stated that:

[I]ntrusion into one's intellect, when one is involuntarily detained and subject to the control of institutional authorities, is an intrusion into one's constitutionally protected right to privacy. If one is not protected in his thoughts, behavior, personality and identity, then the right of privacy becomes meaningless.<sup>39</sup>

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is imposed on a physician when a given medical procedure involves a known risk of serious bodily harm. The medical doctor is required to disclose all the material risks involved and also to explain in lay terms the complications that might possibly occur. All potential perils must be divulged that are material to the patient's decision. Cf. *Cobbs v. Grant*, 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1 (1972); *Getchell v. Mansfield*, 269 Or. 174, 489 P.2d 953 (1971).

There seems to be considerable difficulty in obtaining the uncoerced consent of an involuntarily detained inmate. See *Kaimowitz v. Dep't Mental Health*, Civ. Action No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), in 42 U.S.L.W. 2063 (July 31, 1973). See also *MENTAL HYGIENE*, *supra* note 24, at 13, wherein Dr. Breggin discusses the difficulty of obtaining a voluntary consent of an involuntarily detained inmate. Dr. Breggin states that the "consent form in the psychosurgical unit of the California prison explicitly stated that the prisoner would be released from solitary confinement in return for his 'consent' to treatment." For an example of the consent form signed by one psychosurgery candidate, see *Spoonhour*, *supra* note 26, at 443 n.67. See generally *Patient's Informed Consent*, note 20, *supra*.

37. See generally *Spoonhour*, note 26, *supra*.

38. Civ. Action No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), in 42 U.S.L.W. 2063 (July 31, 1973).

39. 42 U.S.L.W. 2063-2064 (July 31, 1973). *Kaimowitz*, the attorney for Louis Smith, in obtaining an injunction to prevent psychosurgery, argued that:

[O]ffered a choice between indefinite and perhaps lifelong confinement in a place without treatment and brain surgery, which might do damage and certainly has a permanent albeit somewhat unknown, effect but affords the only way out, people like Louis Smith might very well choose the latter.

The patient, Louis Smith, had been placed in a mental hospital at the age of seventeen by his parents. They were unable to control "the tantrums and unbecoming sexual interest" which he displayed. *Shawcross*, *supra* note 33, at 452. While in the mental hospital he raped and then strangled a nurse. He was subsequently examined by three psychiatrists and declared to be a criminal sexual psychopath. Under Michigan state law he was given an indefinite sentence to a maximum security hospital. Smith's release from this institution depended upon his ability to prove that he was no longer a danger to society.

Another court has recognized that the Constitution may protect the mental processes of an individual. In *Mackey v. Procunier*,<sup>40</sup> the Ninth Circuit Court of Appeals stated that tinkering with the mental processes raises serious constitutional questions. Although the court in *Mackey* did not declare to which constitutional right it was alluding, it did indicate that affirmative constitutional action might be in order to protect the mental processes of an inmate.

The court in *Mackey* ruled that forcible injection of an experimental drug into a prisoner for the purpose of modifying criminal behavior may be impermissible.<sup>41</sup> Because psychosurgery is at least as intrusive as the treatment involved in *Mackey*, it seems that psychosurgery, *a fortiori*, falls within the constitutionally protected area referred to in *Mackey*.<sup>42</sup>

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After being institutionalized for a number of years, his behavior had been free of aggression and his violent tendencies seemed to be under control. Despite this fact, neither he nor his parents believed the hospital would ever pronounce him cured and allow him to leave. When Smith was given an opportunity, seventeen years after his incarceration, to become a subject in a project studying the effects of psychosurgery on aggressive tendencies, he accepted. See Shawcross, *supra* note 33, at 452. See also Spoonhour, *supra* note 26, at 443. The author states there that the testimony in the Kaimowitz trial revealed that Smith would have been considered for release within six months to a year and that Smith was probably treatable by more conventional forms of therapy.

40. 477 F.2d 877 (1973). In this case a state prisoner's complaint alleged that at a state medical facility, he had received a fright drug without consent. The prisoner consented to undergo shock treatment but not to having the drug succinylcholine administered. This drug causes one to "regularly suffer nightmares in which he relives frightening experiences and awakens unable to breathe."

41. *Id.* at 878. In the United States, "our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). Despite the fact that the United States Constitution does not explicitly mention any right of privacy, the United States Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152 (1973). A right appears to be considered constitutional when it precludes "unwanted governmental intrusion into one's privacy." *Stanley v. Georgia*, *supra*.

The makers of [the United States] Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added).

42. See *Patient's Informed Consent*, *supra* note 20, at 527.

### III. INTERNATIONAL RIGHT TO MENTAL PRIVACY

The machinery of the government should not be permitted to tamper with the mental processes of the individual solely for the purpose of furthering its political and ideological ends.<sup>43</sup> The government should not interfere with individual expression unless it is an immediate and imminent threat to the very existence of the state.<sup>44</sup> However, even the existence of such a threat furnishes no justification for mind alteration by either surgical or non-surgical procedures.<sup>45</sup> The use of such techniques can never be a permissible practice no matter how legitimate the ends.

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43. The state's power to coerce individuals should be internationally curtailed. The state is a greater threat than individuals.

Where the institution in question is the state, that power is tremendous. That is why technicalities must free the criminal. History has proved that we can survive criminals at large; we cannot survive the state at large.

Jackson, *Are All Laws Technicalities?*, JURIS DOCTOR, Nov. 1974, at 16, 17. Without placing limits on a state's power, the population at large could conceivably be controlled by governmental intimidation. Intrusions into the mental processes of a state's nationals with drugs and surgical means place a chilling compulsion on deviants to become conformists. In view of the fact that psychosurgery has been advocated for the control of domestic and international violence in the political sphere, the danger of a massive use of psychosurgery is not an exaggeration. See 1973 Hearings, *supra* note 20, at 439. This is probably the reason that when it met at Cambridge University in England, the Third International Congress on Psychosurgery unequivocally, universally, and internationally condemned any use of psychosurgery for political or social purposes. *Cingulotomy Helps Some Patients*, Surgeon Says, 225 J. AM. MED. ASS'N. 1036 (1973).

It is interesting to note that one group of neurosurgeons, the International Association for Psychosurgery, is apparently in favor of psychosurgery. MEDICAL OPINION, *supra* note 19, at 32.

44. The constitutional limitations on governmental interference with free speech in the United States could form a workable basis for international guidelines. The following cases demonstrate the limitations that are placed upon the United States government. In *Yates v. United States*, 354 U.S. 298 (1956), the Supreme Court held that advocacy of abstract principles divorced from any effort to instigate action to that end is not precluded by the Smith Act. This is true even though such advocacy may be engaged in with evil intent. See also *Dennis v. United States*, 341 U.S. 493 (1951).

The government in *Cohen v. California*, 403 U.S. 15 (1971), attempted to regulate the content of an individual's message by arresting him when he wore a jacket that allegedly had vulgar words across its back. The intent of the arresting parties was apparently to control the content of the message. The Court stated:

We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.

*Id.* at 26.

45. Despite his acts, the individual should be guaranteed the right to retain

The United Nations appears to be in accord with this position. One of the stated purposes of those establishing the United Nations was to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . ."<sup>46</sup> Although the United Nations has not unequivocally stated that one of its purposes is to protect the mental integrity of the individual, it seems evident that such a purpose is implicit in the above language.

Article 22 of the Universal Declaration of Human Rights is more directly related to the mental integrity of the individual and provides that:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the *free development of his personality*.<sup>47</sup>

The underlying theme of this provision is that there should be both national and international cooperation to insure that the individual's "personality" can freely develop. However, because it is unclear whether the United Nations principles relating to human rights are pronouncements of enforceable rights or whether they are mere statements of future goals,<sup>48</sup> it is essential that the United Nations position on the sanctity of a person's thought process be unequivocal. By internationally codifying one's right to remain free of excessive human modification, the United Nations could establish standards which preclude repression of social and political dissidence in any manner which destroys a person's mind.<sup>49</sup>

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his overall personality. This inviolable right of man can serve as the only sure foundation for a genuine and long-lasting system of international cooperation. See San Diego Evening Tribune, Oct. 9, 1975, at 1, col. 1. The U.N. General Assembly has expressed its agreement with this position in part one of article 10 of the International Covenant on Civil and Political Rights. This section states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." G.A. Res. 2200A, 21 U.N. GAOR Supp. 16, at 54, U.N. Doc. A/6546 (1966) [hereinafter cited as International Covenant].

46. See U.N. CHARTER, preamble.

47. Universal Declaration of Human Rights, art. 22, G.A. Res. 217, U.N. Doc. A/810 at 75 (1948) (emphasis added) [hereinafter cited as Declaration of Human Rights].

48. Guggenheim, *Key Provisions of the New United Nations Rules Dealing with Human Rights Petitions*, 6 N.Y.U.J. INT'L L. & POL. 427, 437 (1973).

49. By "destroy" the author is referring to the physical destruction of the

"Mental freedom" is the antecedent to the autonomous exercise of any rights relating to communication.<sup>50</sup> If a person loses the capacity to generate thought, ideas and mental activity—the freedom of mentation—the freedom of expression becomes meaningless.<sup>51</sup>

Thought cannot be seen, and therefore it cannot be directly judged or coerced. Despots can compel men's bodies, but their hold upon minds is indirect and uncertain.

To describe Socrates in gaol as a free-minded man without liberty does not mean that he had lost the natural creative power of his mind; that power remained, and it has worked among humanity for more than two thousand years. It is only a way of saying that the freedom of Socrates' mind was beyond the power of the Athenian state which imprisoned and destroyed his body.<sup>52</sup>

Thus, even though a person might be denied physical liberty, the creative power of the mind can still exist and be safeguarded.

The mentality of a person is the determining factor of his behavior, personality, and identity.<sup>53</sup> Hence permanent therapeutic changes in an individual's mental processes permit manipulation of the very essence of human existence as it is known. Without formulation and recognition of a protectable right to "mental privacy",<sup>54</sup> establishment of other human rights may be in vain.

The Universal Declaration of Human Rights is presently the most useful and convenient tool in which to incorporate the components that make up the right to "mental privacy".<sup>55</sup> Mental pri-

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mind or any part thereof. See generally Chorover, *Psychosurgery: A Neuropsychological Perspective*, 54 BOSTON U.L. REV. 231 (1974).

50. Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 SO. CALIF. L. REV. 237, 255-276 (1974) [hereinafter cited as Shapiro]. See also Gobert, *supra* note 27, at 187.

51. Shapiro, *supra* note 50, at 258-261. See also *Kaimowitz v. Dep't Mental Health*, Civ. Action No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), in 42 U.S.L.W. 2063 (July 31, 1973). In *Kaimowitz* the court also noted the necessary connection between mentation and communication.

52. *POWER IN MEN*, *supra* note 1, at 17.

53. Shapiro, *supra* note 50, at 275. See generally Public Health Service, note 21, *supra*.

54. Shapiro, *supra* note 50, at 275. The concept of mental privacy is intended to serve as a bar to governmental intrusions into the mental processes for the purpose of altering or destroying the integrity of the mind. The concept is intended to preclude only those governmental intrusions solely designed to repress social or political dissidence and which are not consented to by the subject.

55. Presently the U.N. human rights clauses do not set forth standards that

vacy could be interpreted as being the first expressed component of an international right to privacy.<sup>56</sup> Recent action taken by the United Nations demonstrates that there has already been international recognition of a right to privacy.

The Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights contain provisions that illustrate this recognition.<sup>57</sup> Article 12 of the Universal Declaration of Human Rights provides:

No one shall be subjected to arbitrary interference with his privacy, family home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.<sup>58</sup>

The language of article 17 of the International Covenant on Civil and Political Rights is similar to the above article. The provisions of article 12 are subject to limitations in article 29 of the Universal Declaration, which reads in part as follows:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>59</sup>

Thus, article 29 of the Universal Declaration best exemplifies the United Nations recognition that the scope of the right of privacy must not be such that it threatens the welfare of others.<sup>60</sup>

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can be used as guides for determining whether a particular human rights provision has been violated. Precise interpretation of the particular human rights and fundamental rights that a certain provision represents could serve as a guide to a State in its domestic behavior. See generally Schluter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CALIF. L. REV. 110 (1975) [hereinafter cited as Schluter].

56. "If the right to privacy is to be at all meaningful, it must necessarily include the right to bodily inviolability and the right to one's personality." Goert, *supra* note 27, at 191.

57. Declaration of Human Rights, note 47, *supra*; International Covenant, *supra* note 45, at 49, 52.

58. Declaration of Human Rights, *supra* note 47, at 73-74.

59. *Id.*, art. 29(2), at 77.

60. *Id.* Article 30 of the Universal Declaration seems to suggest that a person should not be allowed to act in a manner that may curtail the rights of other nationals. This article in relevant part provides that:

Nothing in this Declaration may be interpreted as implying for any . . . person any right to engage in any activity or to perform any act aimed

While the Universal Declaration lacks the legal force of an international treaty:

[T]he very existence of an internationally-recognized right to privacy presupposes agreement that there are certain areas of the individual's life that are outside the concern of either governmental authorities or the general public, areas which may vary in size from country to country but which do possess a common central core.<sup>61</sup>

The clause in article 12, "no one shall be subjected to arbitrary interference with his privacy" could be construed to include "mental privacy" as a component. All the United Nations need do is give this provision lasting legal effect. Article 12 of the Universal Declaration could be the safeguard that guarantees "mental privacy" as an international freedom.<sup>62</sup>

#### IV. PUBLICITY AS A MEANS TO SAFEGUARD THE INTERNATIONAL RIGHT TO PRIVACY

The establishment of an international right to privacy by the U.N. will have little effect unless it is safeguarded by an international body. In the past, the notion of domestic jurisdiction<sup>63</sup> was the major obstacle to international protection of human rights. The principle of domestic jurisdiction is set forth in article 2(7) of the United Nations Charter which provides that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . . .<sup>64</sup>

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at the destruction of any of the rights and freedoms set forth [in the Universal Declaration of Human Rights].

Declaration of Human Rights, *supra* note 47, at 77.

61. U.N. Doc. E/CN. 4/1116 at 13 (1948).

62. The United Nations' recognition of the right to mental privacy appears to be demonstrated by the Universal Declaration of Human Rights. It is stated that "everyone has the right to freedom of thought [and] conscience. . . ." Declaration of Human Rights, art. 18, note 47, *supra*.

63. The principle of domestic jurisdiction is that the state shall be master in its own house. Jurisdiction is the competence to prescribe and enforce rules of law governing persons and things. . . . Jurisdiction in great part denotes both state power and national territory, and it is called domestic, with strong evocation of house and home, where it covers matters of peculiar national concern, to be reserved to the state to the exclusion of all foreign influence or intervention.

Fawcett, *Human Rights and Domestic Jurisdiction*, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 286 (E. Luard ed. 1967).

64. U.N. Charter, art. 2(7).

Despite the language of article 2(7), which expressly establishes the exclusive jurisdiction of individual states over matters of national concern, customary law has changed regarding the content of what is considered to be within the domain of the domestic jurisdiction of a nation.<sup>65</sup> As one authority has stated:

[I]t appears that the universal attention devoted to the way in which people are treated in their own country, and the practice of the United Nations in this field, must clearly be interpreted as indicating that human rights have finally been removed from the exclusive jurisdiction of states and lifted up into the realm of international concern. As a consequence, human rights have been placed outside the reach of the Article 2(7) intervention ban, even in cases not amounting to a threat to the peace.<sup>66</sup>

This view is supported by United Nations application of the doctrine of humanitarian intervention to situations where grave breaches of human rights have occurred.<sup>67</sup> However, because of the quantitative prerequisite to the invocation of the doctrine of humanitarian intervention, this doctrine is inapplicable as a means to safeguard "mental privacy."<sup>68</sup>

Governments need not alter the mental processes of everyone in order to exert control over an entire population. Such treatment directed at a small number of key persons can be sufficient to achieve this desired effect.<sup>69</sup> Since this method of control will probably not justify the use of the doctrine of humanitarian intervention, "mental privacy" must therefore be protected on a qualitative rather than a quantitative basis.

The most effective way to safeguard "mental privacy" is through the power of public or world opinion. Although neither

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65. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CALIF. W. INT'L L. J. 203, 241 (1974) [hereinafter cited as Fonteyne].

66. *Id.* at 241.

67. *Id.* at 260.

68. The U.N. seems reluctant to intervene into state matters for humanitarian motives until there is in fact the threat of widespread human rights violations evolving into actual "mass deprivation." *Id.* However, if the right being violated is in fact a human right, then the right itself does not become more sacred merely because there is a greater number of persons whose same human right is being violated.

69. It has been contended that electrodes do not have to be placed in the brains of everyone for control to be exerted over an entire population. After a few key people are so treated the rest of the population will be intimidated. See 1973 Hearings, *supra* note 20, at 381.



the United States nor the Soviet Union need fear military sanctions of less powerful nations, both nations attach the greatest importance to opportunities offered by membership in the United Nations where each can present its position and exert influence upon world opinion.<sup>70</sup> The use of public opinion seems to be the most realistic way of insuring that an international right to privacy be safeguarded in powerful nations of the world community.

The power of publicity to aid the oppressed is a practice which has been fervently urged in the past in United Nations proceedings.<sup>71</sup> The rationale for such publicity is that exposure of injustices or deprivations of human rights could alleviate such conditions.<sup>72</sup> The United Nations has used public opinion in its attempt to force South Africa to abandon apartheid. The United Nations Secretary-General was requested by the United Nations Human Rights Commission:

[T]o give the widest possible publicity, as soon as possible, to the documents . . . containing the testimony of political prisoners, victims of torture and ill-treatment in the prisons of South Africa . . . .<sup>73</sup>

Additionally, the Commission called upon the member states to publicize, through all available media, the substance of these documents.<sup>74</sup> In 1967, the General Assembly:

[I]nvited all States to encourage the establishment of national organizations for the purpose of further enlightening public opinion on the evils of apartheid and requested the Special Committee on Apartheid to report on measures which might appropriately be taken to ensure the widest dissemination of information on the evils of apartheid and the efforts of the international community to secure its elimination . . . .<sup>75</sup>

The United Nations Human Rights organizations have not confined their use of publicity to dissemination of information regarding the anti-apartheid struggle. For instance, after the Economic and Social Council requested wide circulation of a report

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70. Friedman, *National Sovereignty, International Cooperation, and the Reality of International Law*, 10 U.C.L.A. L. REV. 739, 749 (1963).

71. See J. CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS 154 (1970) [hereinafter cited as U.N. PROTECTION].

72. *Id.*

73. *Id.* at 155.

74. *Id.*

75. *Id.* at 157.

on slavery, the appeal was met with a number of newspaper stories.<sup>76</sup>

The actual effectiveness of publicity in protecting basic rights, of course, cannot be determined. Only the opinions of those experts with U.N. experience can be called on as evidence. In the absence of other assuredly productive procedures, publicity at least is worth trying for whatever results it achieves. The mere satisfaction of those aggrieved, on seeing their oppressions widely broadcast, would suffice for justification even if it could be proved that the experienced persons cited are wrong when they say that sovereigns do care about public opinion.<sup>77</sup>

If the public is made fully aware of its rights, it may be able to initiate change even in societies which utilize repressive mechanisms to control the population.

## V. CONCLUSION

Rather than continuing to serve as an international body that promulgates documents on human rights without deeming which "rights" may be a basis for a claimed violation, the United Nations should formulate and adopt an international right of mental privacy.<sup>78</sup> Such a "right" seems fundamental to the autonomous exercise of the rights set forth in the Universal Declaration of Human Rights.<sup>79</sup>

The concept of "mental privacy" could preclude governmental intrusions into mental processes when the sole purpose of the state is to further its own ends by repressing social or political dissidence.<sup>80</sup> By allowing the freedom of the individual to become

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76. *Id.* See also J. CAREY, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 13 (1968).

77. U.N. PROTECTION, *supra* note 71, at 158. See also J. CAREY, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 13-15 (1968).

78. The human rights provision in article 12 of the Universal Declaration of Human Rights which provides "no one shall be subjected to arbitrary interference with his privacy," constitutes nothing more than an abstract regulation that is general in content. The standards which this clause is supposed to contain should include the component of mental privacy. In this manner, states could be given fair notice of how they are expected to behave. See generally Gobert, *supra* note 27.

79. See Declaration of Human Rights, *supra* note 47, arts 2, 8.

80. This international right to mental privacy does not have to be worded in a manner that absolutely precludes nationals from waiving the international enforcement thereof. By establishing international guidelines for scrutinizing any such waiver, coercive forces that may have influenced an individual's decision can

subordinated to the general welfare of the state, the United Nations seems to be abandoning its concern for the personal integrity of individuals.

In order to insure to future man greater personal freedom, the United Nations must adhere strictly to the provisions of the Declaration of Human Rights. By safeguarding this right, the realization of other human rights becomes possible.<sup>81</sup> Having enacted many provisions guaranteeing individuals' basic rights, the United Nations should not shrink from its duty to guarantee each person's mental integrity.

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be detected and eliminated. For a summary of some international opinions on the ethics of, and indications for psychosurgical intervention, see *Cingulotomy Helps Some Patients, Surgeon Says*, 225 J. AM. M. ASS'N 1036, 1037 (1973).

81. The human being is a functional trinity of sensory inputs and behavioral responses connected by the essential link of intracerebral processes. The three aspects are equally essential. . . .

J. DELGADO, *PHYSICAL CONTROL OF THE MIND TOWARD A PSYCHOCIVILIZED SOCIETY* 244 (1969). In view of the fact that both psychosurgery and psychotherapeutic drugs alter the functional trinity which constitutes the human being, it seems evident that such intrusions into the mental processes are in fact changing the "essence of man." See MENTAL HYGIENE, note 24, *supra*.